Supreme Court, U.S.
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No. 09-

IN THE
Supreme Court of the United States

BIRMINGHAM BOARD OF EDUCATION,

Petitioner,

v.

CATHY McCORD-BAUGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has consistently held that an appellate court, either federal or state, must apply the law in effect at the time it renders its decision. Specifically, this Court has stated that "[i]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule that governs, the law must be obeyed. . . ." *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 282 (1935) (quoting Chief Justice Marshall). In an one page opinion, the Alabama Supreme Court, without any analysis, upheld the decision of the Alabama Court of Civil Appeals affirming the trial court's judgment against the Birmingham Board of Education ("Board")in a 42 U.S.C. § 1983 equal protection "class-of-one" claim brought by Cathy McCord-Baugh (plaintiff/respondent), an employee of the Board, despite the fact that this Court rendered its decision in *Engquist v. Oregon Dept. of Agriculture, et al.*, 128 S. Ct. 2146 (2008), which held that such actions cannot be brought against public entities, such as the Board.

The question presented is whether the Alabama Supreme Court should be reversed because it impermissibly ignored the controlling intervening United States Supreme Court decision in *Engquist*, as it decided the pending federal question of whether an employee of a public school district could sustain an equal protection "class-of-one" claim against a public school district.

PARTIES TO THE PROCEEDING

Petitioner is the Birmingham Board of Education, which was the defendant in the circuit court (trial court) and the appellant in the Alabama Court of Civil Appeals, as well as, before the Alabama Supreme Court. Respondent is Cathy McCord-Baugh, a public school employee, who was the plaintiff below and appellee in both the Alabama Court of Civil Appeals and the Alabama Supreme Court.

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OPINIONS BELOW

The April 20, 2006, judgment of the Circuit Court of Jefferson County, Alabama, in favor of the plaintiff/respondent Cathy McCord-Baugh is not reported. It is reproduced at App. 3a.

The April 20, 2007, decision of the Alabama Court of Civil Appeals upholding the circuit court's judgment in favor of plaintiff/respondent Baugh is reported at 12 So.3d 169 (Ala. Civ. App. 2007), and is reproduced at App. 1a.

The May 19, 2008, decision and certificate of judgment from the Alabama Supreme Court granting the defendant/petitioner Birmingham Board of Education's petition for writ of certiorari is not reported. It is reproduced at App. 35a and 38a.

The September 30, 2009, decision of the Alabama Supreme Court quashing the petition for writ of certiorari, previously granted to the defendant/petitioner Birmingham Board of Education, is reported at __ So.3d __ (Ala. 2009); 2009 Ala. LEXIS 229, and is reproduced at App. 36a.

STATEMENT OF JURISDICTION

The Alabama Supreme Court entered the decision that is the subject of this petition for certiorari on September 30, 2009. *See* App. 36a and 38a. This petition is timely because it is filed within 90 days of the judgment entered by the Alabama Supreme Court on September 30, 2009. *See* Sup. Ct. R. 13.3.

This Court has jurisdiction because this case deals with a question of federal law; specifically, the applicability of an equal protection "class-of-one" claim brought pursuant to 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides:

> ***Every person who, under color*** of any statute, ordinance, regulation, custom, or usage, ***of any State*** or Territory or the District of Columbia, ***subjects, or causes to be subjected, any citizen of the United States*** or other person within the jurisdiction thereof ***to the deprivation of any rights, privileges***, or immunities ***secured by the Constitution*** and laws, ***shall be liable to the party injured in an action at law***, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Emphasis added.

INTRODUCTION

In the decision below, the Alabama Supreme Court (in a 6 to 3 opinion) upheld a judgment against the Birmingham Board of Education ("Board") in an equal protection "class-of-one" claim brought by the plaintiff/respondent Cathy McCord-Baugh ("Baugh"), pursuant to 42 U.S.C. § 1983. That decision directly conflicts with this Court's holding in *Engquist v. Oregon Dept. of Agriculture*, 128 S.Ct. 2146 (2008), which held that public entities are not subject to equal protection "class-of-one" claims. *Engquist* at 2148-2149 Moreover, the Alabama Supreme Court's decision is contrary to, and irreconcilable with, this Court's decisions in *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1935) and *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941), which hold that an appellate court must apply the law in effect at the time it renders its decision. Given the "obvious[ness]" of the Alabama Supreme Court's error, this Court should grant the petition for certiorari and summarily reverse that decision. *Gonzales v. Thomas*, 126 S.Ct. 1613, 1614 (2006). *See also, e.g., Horn v. Ba*nks, 536 U.S. 266, 267 (2002) (summary reversal appropriate where decision "directly contravene[s]" Supreme Court precedent); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (summary reversal appropriate where decision is "flatly contrary to this Court's controlling precedent"). Alternatively, this Court should grant the petition and set the case for briefing and argument.

STATEMENT OF THE CASE

A. Facts and State Court Proceedings

On October 19, 1999, the plaintiff, Cathy McCord-Baugh ("respondent/Baugh"), filed a complaint against her employer, the Birmingham Board of Education ("petitioner/Board"); then Superintendent Dr. Johnny Brown, in both his individual and official capacities; and the individual Board members at that time, namely, Larry Coleman, Virginia Volker, Darryl Lee, Annie Davis and Mary Moore, in both their individual and official capacities (collectively referred to as "Board defendants"). App. 6a.[1]

Baugh alleged in her complaint that the defendants violated her federal rights by claiming she was either a "special projects coordinator" or a "project assistant" in order to deny her proper placement on the board adopted salary schedule for Community School Coordinator, among other things.[2] App. 6a.

On May 12, 2000, the Board defendants filed a motion for summary judgment and brief in support

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[1] By Order dated September 6, 2005, the Alabama Court of Civil Appeals determined that the individual defendants were due to be dismissed under the doctrine of qualified immunity established for Section 1983 claims.

[2] Baugh asserted the following causes of action in her Complaint: (1) "denial of equal protection under the Constitution of the United States, the Constitution of Alabama, 1901, and 42 U.S.C. § 1983" (Count One) and (2) breach of contract (Count Two). App. 6a & 23a.

thereof, alleging among other things, that Baugh could not bring an equal protection claim since she failed to show that the Board treated her differently with the intent to discriminate against her on the basis of any impermissible grounds, such as her race. App. 6a-7a. On June 23, 2000, the trial court granted the Board defendants' motion for summary judgment on all claims. App. 8a. Thereafter, Baugh appealed the trial court's decision granting the Board defendants' summary judgment to the Alabama Court of Civil Appeals, which affirmed the trial court's decision. App. 8a. Baugh then petitioned the Alabama Supreme Court for a writ of certiorari. App. 5a.

On April 2, 2004, the Alabama Supreme Court remanded the case solely on Baugh's 42 U.S.C. § 1983 equal protection "class-of-one". *See Ex parte McCord-Baugh* 894 So. 2d 679 (Ala. 2004); *see also* App. 23a. The court held that the then recent United States Supreme Court decision in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), which recognized an equal protection "class-of-one" claim, allowed Baugh's equal protection claim to proceed. *Id.*

After the case was remanded to the trial court on Baugh's equal protection "class-of-one" claim, the Board filed a renewed motion for summary judgment addressing that claim which was denied by the trial court; and the case was tried before a jury on April 17, 2006. App. 2a. At the conclusion of the trial, the jury returned a verdict in the amount of $44,279.44 in favor of Baugh[3]. App. 3a.

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[3] The trial court suspended consideration of Baugh's request for an award of attorney fees and costs to allow the parties an opportunity to exhaust all avenues of appeal.

B. Appellate Court Proceedings

Following the trial court's denial of the Board's motion for new trial, on August 14, 2006, the Board appealed this matter to the Alabama Court of Civil Appeals. On April 20, 2007, the Alabama Court of Civil Appeals, affirmed the trial court's judgment without issuing an opinion. App. 1a. On May 4, 2007, the Board petitioned the Alabama Supreme Court for a writ of certiorari to the Alabama Court of Civil Appeals. On May 19, 2008, the Alabama Supreme Court granted the writ. App. 35a.

On June 9, 2008, the same day that the Board's brief in support of its petition for writ was filed, while this case was still pending before the Alabama Supreme Court, the United States Supreme Court issued its decision in *Engquist v. Oregon Department of Agriculture*, 128 S. Ct. 2146 (2008). Based on this change in the law, on June 16, 2008, the Board immediately filed a motion to vacate the judgment of the Alabama Court of Civil Appeals and of the trial court and to dismiss the complaint. The Board based this motion on the fact that the *Engquist* decision held that an "class-of-one" equal protection claim, which was established in *Village of Willowbrook v. Olech*, in 2000, could not be brought against a public entity.[4]

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[4] It is interesting to note that the United States Supreme Court February 23, 2000 decision in *Olech*, which held that a plaintiff could bring a "class of one" equal protection claim, was the basis for the Alabama Supreme Court's remand of the instant case in April of 2004. App. 23a. Thus, the Alabama Supreme Court, in this very action, has recognized the binding effect of intervening United States Supreme Court decisions on a question of federal law.

On December 18, 2008, the Alabama Supreme Court issued an Order specifically directing the parties to simultaneously file briefs "addressing the applicability and effect of the decision in *Engquist v. Oregon Department of Agriculture.*" App. 37a. In accordance with that Order, both parties submitted briefs regarding the applicability of *Engquist* on January 20, 2009. Thereafter, on September 30, 2009, the Alabama Supreme Court issued a decision quashing the writ previously granted, and in essence upholding the judgment against the Board on Baugh's equal protection "class-of-one" claim. App. 36a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari (and either summarily reverse or set the case for briefing and argument) because the Alabama Supreme Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Specifically, in the pages that follow, we will demonstrate that: (1) the decision of the Alabama Supreme Court, rendered in this case, clearly conflicts with this Court's holding that an appellate court must apply the law in effect at the time it renders its decision; (2) pursuant to *Engquist* (which was in effect and binding on the Alabama Supreme Court at the time that it issued its decision on September 30, 2009), public employees cannot bring an equal protection "class-of-one" claim against their public employers; and (3) the Birmingham Board of Education is a public entity and thus, not subject to suit pursuant to 42 U.S.C. Section 1983 equal protection "class-of-one" claims.

I. THE DECISION OF THE ALABAMA SUPREME COURT DIRECTLY CONFLICTS WITH THIS COURT'S PREVIOUS HOLDINGS THAT AN APPELLATE COURT MUST APPLY THE LAW IN EFFECT AT THE TIME IT RENDERS ITS DECISION

The claim pending in the Alabama Supreme Court against the Board was Baugh's 42 U.S.C. § 1983 equal protection "class-of-one" claim, which is the exact claim that this Court held in *Engquist*, could not be brought against a public entity, such as the Board. *See Engquist* at 2148-2149.

Baugh's Section 1983 equal protection "class-of-one" claim was alive and still pending before the Alabama Supreme Court on June 9, 2008, when *Engquist* was rendered by this Court. Since *Engquist* directly governs Baugh's claim, the Alabama Supreme Court was bound to follow the law as it existed at the time it issued its decision. This Court has consistently held that as a general rule, an appellate court must apply the law in effect at the time it renders its decision.

> "If subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule that governs, that law must be obeyed . . . [t]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of the law, the judgment must be set aside."

Thorpe, 393 U.S. 268, 282 (1935) (quoting Chief Justice Marshall). The Court further noted that the same reasoning applied whether the change is constitutional, statutory, or judicial. *Id.*

In the instant case, the matter pending before the Alabama Supreme Court, was a question of federal law, just as in *Thorpe*. As the court held in *Thorpe*, intervening federal decisions must be applied, even in state appellate courts. *Thorpe* at 281-282.

Moreover, the Alabama Supreme Court itself has clearly and consistently recognized the general rule that a case pending on appeal will be subject to any change in substantive law. *Alabama State Docks Terminal Rail-Way v. Lyles*, 797 So.2d 432, 438 (Ala. 2001). Courts are required to apply in a particular case the law as it exists **at the time it enters its final judgment**. *Id.* [emphasis added].

> "[I]t has long been held that if there is a change in either the statutory of decisional law before the final judgment is entered, the appellate court must 'dispose of [the] case according to the law as it exists at the time of the appeal.' This rule is usually regarded as being founded upon the conceptual inability of a court to enforce that which is no longer the law, even though it may have been the law at the time of trial, or at the time of the prior appellate proceedings."

Alabama State Docks Terminal Rail-Way v. Lyles at 438, citing to *Prospective Overruling and Retroactive*

Application in the Federal Courts, 71 Yale L.J. 907, 912 (1962) (quoting *Montaque v. Maryland*, 54 Md. 481, 483 (1880)).

Thus, not only did the Alabama Supreme Court's holding in the instant case conflict with the law established by this Court, but it also conflicts with its own prior decisions, which are consistent with *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1935) and *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941).

II. DECISIONS OF THE UNITED STATES SUPREME COURT INTERPRETING FEDERAL QUESTIONS GOVERN FEDERAL CASES BEFORE STATE COURTS OF LAST RESORT

It has long been established that decisions of the United States Supreme Court interpreting federal law are binding upon both federal and state lower courts. See *Henry et. al., v. City of Rock Hill*, 376 U.S. 776,777 (1964) (holding that a rule stated in a decision by the Supreme Court of the United States and based upon the Federal Constitution is, under the supremacy clause, binding upon state courts as well as upon federal courts); *A.L. Lockhart v. Fretwell*, 506 U.S. 364,376 (1993) (THOMAS, concurring) (acknowledging that a state court is bound by the U.S. Supreme Court's interpretation of federal law, but is not bound by the interpretation of a federal court of appeals).

III. THE INSTANT CASE IS ANALOGOUS TO *ENGQUIST V. OREGON DEPT. OF AGRICULTURE*

The evidence is undisputed that Baugh is and has at all times relevant to this lawsuit been a "public employee" employed by a "public board of education". Thus, pursuant to *Engquist*, no such claims can be brought against the Board. *Engquist* at 2148-2149.

In *Engquist*, a state employee alleged that she had been effectively laid off for arbitrary, vindictive and malicious reasons. *Engquist* at 2149. This Court reiterated the long held view that there is a crucial difference, with respect to constitution analysis, between the government exercising "the power to regulate or license, as lawmaker, " and the government acting "as proprietor, to manage its internal operation." *Id.* at 2125. This Court further explained that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Id.* The Court noted that "the government therefore, has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens." *Id.*

The Court further explained that employment decision-making is an enterprise that is "often subjective and individualized, resting on wide array of factors that are difficult to articulate and quantify." *Id.* at 2154. This is in contrast to the regulation in *Olech*, where the "existence of a clear standard against which

departures, even for a single plaintiff, c[an] be readily assessed." *Id.* at 2153. To treat like employees differently is not to violate the equal protection clause; rather, it is an accepted consequence of "the broad discretion that typically characterizes the employer-employee relationship." *Id.* at 2155.

As a result, this Court held that "the class-of-one theory of equal protection has no application in the public employment context." *Id.* at 2156. In arriving at this conclusion, the Court was guided "by the 'common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *Id.* (quoting *Connick v. Myres*, 461 U.S. 138, 143 103 S.Ct. 1684, 1688 (1983)).

The instant case is analogous to *Engquist;* and thus, the rationale and holding in *Engquist* controls this action. Just as in *Engquist*, the respondent/plaintiff Baugh is a state/government employee who brought this equal protection "class-of-one" claim against a public entity, the Birmingham Board of Education. Accordingly, the decision of the Alabama Supreme Court rendered below, is due to be reversed based on this Court's holding in *Engquist.*

IV. RECENT DECISIONS ADDRESSING EQUAL PROTECTION "CLASS–OF-ONE" CLAIMS BROUGHT AGAINST PUBLIC EMPLOYERS HAVE FOLLOWED *ENGQUIST V. OREGON DEPT. OF AGRICULTURE*

While decisions of the Untied States Court of Appeals for the Eleventh Circuit are not binding on the Alabama Supreme Court, such decisions can be considered as persuasive authority by the state court. *A.L. Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (THOMAS, concurring). The Eleventh Circuit has correctly applied the holding in *Engquist* to recent decisions, wherein public employees have brought equal protection "class-of-one" claims against public employers.

In *Brillinger v. City of Lake Worth*, 317 Fed. Apppx. 871 (11th Cir. 2008); 2008 U.S. App. LEXIS 18067, plaintiff Brillinger, a police officer, filed suit against the city's police department alleging, that the department treated him differently than other similarly situated employees in violation of the Equal Protection Clause, when he was proposed for termination for allegedly falsifying overtime documents. The plaintiff appealed the termination pursuant to the city's collective bargaining agreement; however, the arbitrator ordered that Brillinger be reinstated with a demotion. *Brillinger* at 874. Accordingly, the city demoted the plaintiff and he filed suit. *Id.* at 874-875.

Thereafter, the city moved for summary judgment which was granted, and the plaintiff appealed. *Id.* at 875. The plaintiff argued that his "class-of-one" equal

protection claim should not have been dismissed on summary judgment. *Brillinger* at 878.

The Eleventh Circuit affirmed summary judgment on Brillinger's equal protection claim. Relying on *Engquist*, the court held "[w]e are bound by the recent Supreme Court ruling in which the Court concluded that "class of one" Equal Protection claims brought by public employees are not cognizable". *Id.*

In *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269 (11th Cir. 2008), the Eleventh Circuit relied heavily on the Supreme Court's decision in *Engquist*. The court reversed the district court's partial denial of summary judgment with regard to plaintiff's "class-of-one" equal protection claim[5]. *Id.* at 1271. and acknowledged that due to the recent holding in *Engquist*. *Id.* at 1271.

The plaintiff, Douglas Asphalt Company, brought suit against Georgia Department of Transportation officials, alleging that it was wrongly singled out and treated differently than other paving contractors in violation of the equal protection clause. *Douglas Asphalt* at 1271. The Department of Transportation moved for summary judgment, and the district court denied the motion in part allowing plaintiff's equal protection claim to survive. *Id.* at 1271. Thereafter, the department appealed and the Eleventh Circuit reversed and remanded the case. *Id.*

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[5] The court acknowledged that due to the recent publication of *Engquist*, the opinion had not been available to the district for consideration when it denied the defendant's motion for summary judgment on plaintiff's equal protection "class-of-one" claim. *Douglas Asphalt* at 1271.

Following *Engquist*, the Eleventh Circuit held that a "class of one" claim was not legally cognizable under the circumstances of the case, and found that the district court erred in allowing the claim to survive the department's motion for summary judgment. *Douglas Asphalt* at 1271.

While the plaintiff, which was an independent contractor, was not a public employee, the Court nevertheless applied the holding in *Engquist*. *Id.* at 1274. The Court held that "[w]e have little trouble applying the reasoning in *Engquist*, directed at the government-employee relationship, to the circumstances in this case involving a government-contractor relationship." *Id.*

The Court explained that "[j]ust as in the employee context, and in the absence of a restricting contract or statute, decisions involving government contractors require broad discretion that may rest 'on a wide array of factors that are difficult to articulate and quantify.'" *Id.* (quoting *Engquist* at 2154). Therefore, the Court held that "Engquist controls this case and makes clear that Douglas Asphalt failed to assert a cognizable right to equal protection." *Douglas Asphalt* at 1274.

CONCLUSION

The decision of the Alabama Supreme Court rendered below is both plainly wrong and conflicts with the decision of this Court in *Engquist*. Accordingly, this Court should grant the petition for certiorari and either summarily reverse or set the case for briefing and argument.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE STATE OF ALABAMA, JUDICIAL DEPARTMENT, COURT OF CIVIL APPEALS DATED APRIL 20, 2007

STATE OF ALABAMA — JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM, 2006-2007

2050955

Birmingham City Board of Education v.
Cathy McCord-Baugh.
Appeal from Jefferson Circuit Court (CV-99-5870).

BRYAN, Judge.

AFFIRMED. NO OPINION.

Thompson, P.J., and Pittman, J., concur.

Moore, J., concurs in the result, without writing.

Thomas, J., dissents, without writing.

APPENDIX B — TRANSCRIPT OF PROCEEDINGS OF THE STATE OF ALABAMA, CIRCUIT COURT OF JEFFERSON COUNTY DATED APRIL 17, 2006 AND FILED OCTOBER 12, 2006

STATE OF ALABAMA
IN THE CIRCUIT COURT OF JEFFERSON COUNTY

CASE NO. CV99-5870

CATHY MCCORD-BAUGH,

Plaintiff,

Vs.

BIRMINGHAM BOARD OF EDUCATION,

Defendant.

Before: The Honorable J. Scott Vowell,
Circuit Judge, presiding
April 17, 2006
9:45 a.m.

* * *

[Commencing at page 676]

* * *

THE COURT: Okay. And if you would please stand and read the verdict.

Appendix B

JUROR: In the case of Cathy McCord-Baugh, the plaintiff, versus the Birmingham Board of Education, defendant, we the jury find in favor of the plaintiff Cathy McCord-Baugh, and against the defendant, the Birmingham City Board of Education, and assess damages as follows: In the amount of $44,279.44.

THE COURT: Okay. And I am now going to poll the jury. And so I am going to ask each of you if this is your verdict. And we'll start on the back row over on the far right. Is this your verdict?

JUROR: Yes, sir.

THE COURT: Is this your verdict?

JUROR: Yes, sir.

THE COURT: Is this your verdict?

JUROR: Yes, sir.

THE COURT: Is this your verdict?

JUROR: Yes, sir.

THE COURT: Is this your verdict?

JUROR: Yes, sir.

THE COURT: Is this your verdict?

Appendix B

[677] JUROR: Yes, sir.

THE COURT: Is this your verdict?

JUROR: Yes, sir.

THE COURT: Is this your verdict?

JUROR: Yes, sir.

THE COURT: Is this your verdict?

JUROR: Yes, sir.

THE COURT: Is this your verdict?

JUROR: Yes, sir.

THE COURT: Is this your verdict?

JUROR: Yes, sir.

THE COURT: And is this your verdict?

JUROR: Yes, sir.

* * * *

APPENDIX C — OPINION OF THE SUPREME COURT OF ALABAMA RELEASED APRIL 2, 2004

SUPREME COURT OF ALABAMA

1011067

Ex parte CATHY McCORD-BAUGH;
(In re: Cathy McCORD-BAUGH

v.

BIRMINGHAM CITY BOARD OF EDUCATION et al.

April 2, 2004, Released

JOHNSTONE, Justice.

The plaintiff-petitioner Cathy McCord-Baugh properly invoked our Rule 39(a)(1)(D), Ala. R.App. P., certiorari jurisdiction to determine whether the decision of the Court of Civil Appeals in her case, *McCord-Baugh v. Birmingham City Board of Education*, 894 So.2d 672 (Ala.Civ.App.2002), conflicts with the decision of the United States Supreme Court in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). Accordingly, to review that one claim, we granted her petition for a writ of certiorari. Having reviewed the record and considered the law, we reverse and remand.

Appendix C

Procedural Facts

The plaintiff sued the Birmingham City Board of Education, the superintendent of education of the Birmingham City Schools, and the individual members of the Board of Education. The narrow scope of our certiorari review reaches only the plaintiff's claim, under 42 U.S.C. § 1983, that the defendants violated the plaintiff's right to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. She alleged that the defendants intentionally treated her differently from, by paying her less than, others similarly situated. She asserted that the dissimilar treatment of her—the continuing refusal to pay her equally—was arbitrary and capricious and was not rationally related to any legitimate governmental purpose.

The defendants moved for summary judgment on multiple grounds. As stated in the motion for summary judgment, the only ground pertinent to our review reads:

> "Plaintiff's equal protection claim brought pursuant to the Fourteenth Amendment of the United States Constitution must fail as a matter of law because a public official cannot violate a Plaintiff's equal protection rights unless the Defendant has the intent to discriminate. *Parks v. City of Warner Robbins, Georgia*, 43 F.3d 609, 616 (11th Cir.1995); *Mencer v. Hammonds*, 134 F.3d 1066, 1070

> (11th Cir.1998). Plaintiff has not alleged or presented facts evidencing proof of the requisite intent to discriminate."

This ground asserts, in essence, that, in the absence of intent to discriminate, arbitrary and capricious differential treatment does not violate the Fourteenth Amendment. This ground does not deny that the defendants' treatment of the plaintiff was arbitrary, capricious, and not rationally related to any legitimate governmental purpose. The plaintiff responded, in pertinent part:

> "Plaintiff's first cause of action is violation of her . . . Federal equal protection rights caused by defendants' 'irrational and wholly arbitrary' refusal to pay plaintiff the same as similarly situated Community School Coordinators. The facts are undisputed in this case that Plaintiff is paid less 'a different salary arrangement' than other similarly situated community school coordinators and thus Plaintiff meets the prima facie case for violation of Federal . . . equal protection rights. *Village of Willowbrook v. Olech*, [528 U.S. 562 (2000)] . . . ."

Appendix C

The trial court granted the defendants summary judgment on all of the plaintiff's claims. She appealed. Affirming the judgment of the trial court, the Court of Civil Appeals held, in pertinent part:

> "To state an equal-protection claim, McCord-Baugh must have alleged and shown that she was (1) treated differently from similarly situated persons and (2) that the Board treated her differently for the purpose of discriminating against her on an impermissible basis. *See GJR Investments, Inc. v. County of Escambia, Florida*, 132 F.3d 1359, 1367 (11th Cir.1998); *Strickland v. Alderman*, 74 F.3d 260, 264-65 (11th Cir.1996); *E & T Realty v. Strickland*, 830 F.2d 1107, 1109, 1112-13 (11th Cir.1987). We will address the latter requirement.
>
> "McCord-Baugh must show that any differential treatment she received from the Board was motivated by an intention to discriminate on an impermissible basis. *E & T Realty*, 830 F.2d at 1113. In other words, in order to satisfy the second requirement for an equal-protection claim and to prevail, a showing of intentional discrimination is required.
>
> "A showing of unequal treatment of similarly situated persons does not establish an equal-protection claim, absent proof that the

defendant acted with discriminatory intent. *Id.* Discriminatory impact, without more, does not violate the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

"McCord-Baugh responds to the Board's argument in this regard merely by arguing that there is 'record evidence that this unequal treatment—paying McCord-Baugh less than others who perform the same job—has been intentional on the part of defendants.' However, it is not the intent to do a given act that is required in order to satisfy the second element of an equal-protection claim; it is the intent to discriminate that is required. ' "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.' *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (citation omitted; footnote omitted); *see also Jones v. White*, 992 F.2d 1548, 1573 (11th Cir.), cert. denied, 510 U.S. 967, 114 S.Ct. 448, 126 L.Ed.2d 381 (1993).

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> "We do not find substantial evidence in the record of an intent by the defendants to discriminate against McCord-Baugh on the basis of her race, her gender, or any other impermissible ground. . . ."

McCord-Baugh, 894 So.2d at 675-76. These holdings are the only holdings in the opinion of the Court of Civil Appeals deciding adversely to the plaintiff an equal-protection issue raised by the defendants' motion for summary judgment. The Court of Civil Appeals further held, without a supporting ground in the defendants' motion for summary judgment, that the defendants had shown legitimate, nondiscriminatory reasons for their decision not to pay the plaintiff as a community-school coordinator.

Substantive Facts

In November 1989, the Board of Education hired the plaintiff as a "special-projects coordinator." She signed a one-year employment contract. The Board of Education continued employing her. In 1992, she became tenured. The same year, the Board of Education transferred her to Parker Community School to replace the "community-school coordinator" for Parker Community School. Since 1992, the plaintiff has performed the duties of a community-school coordinator. She supervises the same number of employees as any other community-school coordinator and prepares the same community educational program as any other community-school coordinator. Her service area is

comparable to the other community-school coordinators' service areas.

The plaintiff's performance evaluations identify her position as a "Coordinator" in the division titled "Parker Community School." Before her transfer in 1992, an organizational chart showed 11 community-school coordinators. After her transfer to replace one of them, organizational charts continued to show 11 community-school coordinators.

The Birmingham Public Schools Directory identifies the plaintiff as the "Coordinator" at Parker Community School, precisely as it lists other community-school coordinators at their respective Community Schools. Likewise, a printout of employees for Parker Community School shows her as the "Coordinator" of that school.

In a 1994 letter to the senior assistant superintendent, personnel division, Dr. Peggy F. Sparks, then director of the Community Education Department of the Birmingham Public Schools, identified the plaintiff as "an eleven month special projects coordinator" and as "coordinator of Parker Community School." In a 1997 letter to Geraldine Bell, interim superintendent of the Board of Education, Clifton T. Griffin, acting director of the Community Education Department, stated that the plaintiff, a special projects coordinator, had a different salary arrangement than "regular Community School Coordinators."

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In December 1998, the plaintiff wrote a "Personnel Specialist" with the Birmingham Public Schools a letter requesting a salary adjustment to be paid according to the salary schedule for a community-school coordinator. In March 1999, Dr. Sparks, then senior executive director of Parent, Community, and Student Support Programs, wrote the superintendent of the Birmingham Public Schools a letter stating that she had transferred the plaintiff "to a program assistant slot at Parker for Zone I, yet continued her same salary and job description."

In March 1999, Clifton T. Griffin, who was then the coordinator for the West End Community School, wrote Otis Dismukes, the acting director of the Community Education Department, a letter stating that, after he discussed the plaintiff's duties and pay with Mr. Dismukes and Dr. Sparks, "it is ascertained that there are no funds available in the budget for an increase in the salary of any employee, and . . . the only way she can be paid for a regular community education coordinator's salary is to apply for the position when one becomes available and is selected for the position." Shortly thereafter, the Board of Education approved a $17,644 per year pay raise for Dr. Sparks.

Standard and Rules of Review

"On certiorari review, this Court accords no presumption of correctness to the legal conclusions of the intermediate appellate court. Therefore, we must apply de novo the standard of review that was applicable

in the Court of Civil Appeals." *Ex parte Toyota Motor Corp.*, 684 So.2d 132, 135 (Ala.1996). Summary judgment is appropriate only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c)(3), Ala. R. Civ. P., and *Dobbs v. Shelby County Econ. & Indus. Dev. Auth.*, 749 So.2d 425 (Ala.1999). The court must accept the tendencies of the evidence most favorable to the nonmoving party and must resolve all reasonable doubts in favor of the nonmoving party. *System Dynamics Int'l, Inc. v. Boykin*, 683 So.2d 419 (Ala.1996).

If substantial evidence in the record supports a cognizable claim pleaded by the plaintiff, the defendant is not due a summary judgment on that claim, even if the record also contains substantial countervailing evidence. *See Hollingsworth v. City of Rainbow City*, 826 So.2d 787 (Ala.2001); *McGinnis v. Jim Walter Homes, Inc.*, 800 So.2d 140 (Ala.2001); *Ex parte Alfa Mut. Gen. Ins. Co.*, 742 So.2d 182, 184 (Ala.1999). Unless a motion for summary judgment challenges the existence of evidence to support an essential element of the nonmoving party's case, the motion does not shift to the nonmoving party any burden to produce evidence supporting that essential element, and the motion will not support a summary judgment grounded on an absence of supporting evidence or the existence of undisputed countervailing evidence on that essential element. *Kennedy v. Western Sizzlin Corp.*, 857 So.2d 71, 78 (Ala.2003); *Tanner v. State Farm Fire & Cas. Co.*, 874 So.2d 1058, 1068 n. 3 (Ala.2003); *Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found.*,

P.C., 881 So.2d 1013, 1020 (Ala.2003); *Fountain v. Filson*, 336 U.S. 681, 683, 69 S.Ct. 754, 93 L.Ed. 971 (1949).

Law and Analysis

The plaintiff contends that the holding by the Court of Civil Appeals that, in order to withstand summary judgment on her equal-protection claim, she must allege and prove that the defendants treated her differently from other similarly situated employees with the intent to discriminate against her on the basis of a suspect class, such as race, gender, or religion, or on some other impermissible ground, conflicts with *Olech*, *supra*, wherein the United States Supreme Court, affirming the United States Court of Appeals for the Seventh Circuit on a ground different from that invoked by the Seventh Circuit, held:

> "*Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.* See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336 (1989). In so doing, we have explained that ' "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and

> arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." ' *Sioux City Bridge Co.*, *supra*, at 445 (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918)).
>
> ". . . The complaint also alleged that the Village's demand was 'irrational and wholly arbitrary' and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement. *These allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis.*"

528 U.S. at 564-65, 120 S.Ct. 1073 (emphasis added). Although the United States Supreme Court has applied the "class of one" equal-protection violation analysis only to claims of equal-protection violations in land use cases, various federal appellate courts recently have applied or discussed the "class of one" analysis in cases of other kinds of equal-protection violations: *Cobb v. Pozzi*, 352 F.3d 79 (2d Cir.2003); *DeMuria v. Hawkes*, 328 F.3d 704 (2d Cir.2003); *African Trade & Information Ctr., Inc. v. Abromaitis*, 294 F.3d 355 (2d Cir.2002); *Cruz v. Town of Cicero*, 275 F.3d 579 (7th Cir.2001); *Giordano v. City of New York*, 274 F.3d 740 (2d Cir.2001); *Bartell v. Aurora Public Schools*, 263 F.3d 1143, 1149 (10th Cir.2001); *Hilton v. City of Wheeling*, 209 F.3d 1005 (7th Cir.2000). *See Williams v. Pryor*, 240 F.3d 944, 951 (11th Cir.2001).

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On a challenge to a jury verdict in favor of the plaintiffs on equal-protection claims brought by officers who were disciplined for behavior for which other similarly situated officers were not disciplined, the United States Court of Appeals for the Second Circuit stated:

> "[T]he plaintiffs' *Olech*-based equal protection claim is not dependent on their ability to prove that they were disciplined for an impermissible reason, *i.e.*, for their COBA [Corrections Officers' Benevolent Association] membership. Rather, under *Olech*, the plaintiffs can recover if they can show that they were treated differently from similarly situated officers, such as Officers Conway and Vanderwerff, and that there was 'no rational basis for the difference in treatment.' *Olech*, 528 U.S. at 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060. Clearly, the evidence that the defendants disciplined the plaintiffs based on a belief that the plaintiffs were engaged in an unlawful job action makes the task of showing irrational treatment considerably more difficult; however, it does not foreclose the plaintiffs' pursuit of such a claim under *Olech*. A jury could find that the defendants' subjective belief was unwarranted and that such an unwarranted belief resulted in the irrational treatment of the plaintiffs. Accordingly, we agree with the plaintiffs that the evidence adduced at trial was sufficient

> to withstand a motion for judgment as a matter of law on their *Olech*-based equal protection claim."

Cobb v. Pozzi, 352 F.3d at 99-100. *Accord African Trade & Information Ctr., Inc.*, and *Giordano, supra.*

Reversing the dismissal of the equal-protection violation claim by a husband and a wife that police treated them differently from other citizens complaining of harassment, the United States Court of Appeals for the Second Circuit stated:

> "As recognized by the district court, the DeMurias' equal protection claim is governed by the Supreme Court's holding in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam). There, the Court held that a successful equal protection claim may be 'brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.' *Id.* at 564, 120 S.Ct. 1073. Olech sued the Village after it required her to grant a 33-foot easement, as opposed to the 15-foot easement required from other property owners, to connect to the Village's water supply. *Id.* at 563, 120 S.Ct. 1073. Olech claimed that the Village's demand for an additional easement was 'irrational and wholly arbitrary' and was made with the intent to

deprive her of her rights or in reckless disregard of her rights. *Id.* The lower court dismissed Olech's complaint on the pleadings, finding her allegations to be insufficient to state a judicially cognizable equal protection claim. *Id.* The Seventh Circuit reversed, concluding that an allegation of subjective ill will was adequate to make out an equal protection violation.

"The Supreme Court affirmed on a different rationale. The Court found that Olech's complaint could 'fairly be construed as alleging' differential treatment from similarly situated property owners which, coupled with Olech's allegation that the Village's conduct was irrational and wholly arbitrary, was 'sufficient to state a claim for relief under traditional equal protection analysis.' *Id.* at 565, 120 S.Ct. 1073. In so holding, the Court found it unnecessary to consider the question of the Village's subjective motivation. *Id.*"

DeMuria, 328 F.3d at 706.

Affirming a summary judgment entered against a plaintiff-husband and a plaintiff-wife on their claims for an equal-protection violation by a school district in the allegedly wrongful termination of the husband's employment, the United States Court of Appeals for the Tenth Circuit stated:

"We also noted that the Supreme Court recently stated, 'Our cases have recognized successful

> equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.' *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed. 1060 (2000) (per curiam) (quotation omitted). . . ."

Bartell, 263 F.3d at 1149. While the *Bartell* Court recognized that an *Olech* claim does not require motivation by an impermissible animus as an essential element, the *Bartell* Court held that the plaintiff had not asserted an *Olech* claim but instead had chosen and alleged, but had not proved, the distinct theory that the unequal treatment was motivated by an impermissible animus rather than that the unequal treatment was irrational and arbitrary.

The cases decided by the United States Court of Appeals for the Seventh Circuit conflict with those of the Second Circuit and the Tenth Circuit. *Cruz* and *Hilton*, *supra*. The Seventh Circuit acknowledges that a plaintiff asserting an equal-protection claim need not prove his or her status as a member of a suspect class to invoke the protection of the Equal Protection Clause. *Id.* The Seventh Circuit also recognizes that a plaintiff asserting an equal-protection claim must prove two elements. The first, as in *Olech* and the cases from the Second Circuit and Tenth Circuit, is unequal treatment under the laws. However, for the second element, the Seventh Circuit, relying on Justice Breyer's special concurrence in *Olech*, and insisting on their original holding the United States Supreme Court declined to address in *Olech*, has, in their word, "gloss[ed]"

the "irrational and wholly arbitrary" second element of *Olech* to mean

> "that the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position."

Hilton, 209 F.3d at 1008, and *Cruz*, 275 F.3d at 587.

Section 1 of the Fourteenth Amendment reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The text of this Amendment prohibits all denials of equal protection, not just those motivated by an impermissible animus. Thus a strict construction of the Amendment itself supports the conclusion that the majority opinion in *Olech*, quoted *supra*, means exactly what it says, *see Cobb, African Trade & Information Ctr., Inc.*, and *Giordano*, *supra*, without the limitation nevertheless retained by the Seventh Circuit in *Cruz* and *Hilton* to the effect that impermissible motivation is an essential element of an *Olech* claim.

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According to *Olech*, the essential elements of a claim for a federal equal-protection violation to a "class of one" are only that the plaintiff "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Olech*, 528 U.S. at 564, 120 S.Ct. 1073. Accordingly, the holdings by the Court of Civil Appeals to the effect that, to withstand summary judgment, the plaintiff's equal-protection claim must include allegations and proof that the defendants treated her differently for the purpose of discriminating against her on an impermissible basis and to the effect that the absence of "substantial evidence in the record of an intent by the defendants to discriminate against [the plaintiff] on the basis of her race, her gender, or any other impermissible ground" defeats her equal-protection claim and justifies the summary judgment, *McCord-Baugh*, 894 So.2d at 675-76, conflict with *Olech*, *supra*. The plaintiff's allegations, unchallenged by the defendants' motion for summary judgment, that the defendants intentionally, arbitrarily, capriciously, and irrationally treated her differently from, less favorably than, similarly situated employees performing the duties of a community-school coordinator, are sufficient for the requirements of *Olech*, *supra*.

Although the defendants argue before us, and argued before the Court of Civil Appeals, that rational reasons exist for their differential treatment of the plaintiff,

> " '[m]otions and arguments of counsel are not evidence.' '[S]tatements in motions are not evidence and are therefore not entitled to evidentiary weight.' '[B]riefs submitted in

> support of motions are not evidence to be considered by the Court in resolving a summary judgment motion.' "

Fountain Fin., Inc. v. Hines, 788 So.2d 155, 159 (Ala. 2000) (citations omitted). *Accord Ex parte Coleman*, 861 So.2d 1080 (Ala.2003). The record is devoid of evidentiary material establishing a rational basis for the defendants' treating the plaintiff differently from other coordinators. Indeed, the defendants' motion for summary judgment did not challenge the plaintiff's allegations that the defendants' continuing refusal to pay her equally was arbitrary, capricious, and not rationally related to any legitimate governmental purpose. Thus the motion for summary judgment did not shift any burden to the plaintiff to produce her evidence supporting these allegations. *Kennedy*, *Tanner*, *Liberty Nat'l*, and *Filson*, *supra*. Therefore, the motion for summary judgment did not, does not, and would not support summary judgment grounded either on an absence of supporting evidence or the existence of undisputed countervailing evidence on these allegations. *Id.* Consequently, the Court of Civil Appeals erred in holding that "the defendants have shown legitimate, nondiscriminatory reasons for their decision not to pay McCord-Baugh as a community-school coordinator." *McCord-Baugh*, 894 So.2d at 676.

The defendants argue to us as they did to the Court of Civil Appeals that the plaintiff's equal-protection claim is barred by the applicable statute of limitations even if the claim would otherwise withstand summary judgment. The defendants argue to us that, on the ground of the statute of limitations, we should affirm the judgment of

the Court of Civil Appeals affirming the summary judgment even though the decision of the Court of Civil Appeals expressly rejects the defendants' statute-of-limitations defense to the plaintiff's equal-protection claim, *McCord-Baugh*, 894 So.2d at 676. The defendants, however, have not properly invoked our Rule 39(a)(1), Ala. R.App. P., certiorari jurisdiction to review this statute-of-limitations holding against the defendants. *See Marshall v. State*, 884 So.2d 900, 902 (Ala.2003) (clarifying *Ex parte Fountain*, 842 So.2d 726 (Ala.2001)). Thus, this holding by the Court of Civil Appeals remains in full force and effect without our reviewing it or expressing any opinion on it.

The defendants also argue several defenses not reached or not developed in the opinion by the Court of Civil Appeals. Our reversal of the affirmance of the summary judgment on the plaintiff's equal-protection claim neither forecloses nor invites further consideration of these defenses by the Court of Civil Appeals. *See Ex parte Helms*, 873 So.2d 1139 (Ala.2003).

Conclusion

The decision of the Court of Civil Appeals is reversed for its conflict with *Olech*, *supra*, and is remanded for proceedings consistent with this opinion. Because we have not accepted for certiorari review the affirmance of the summary judgment on the plaintiff's claim that the defendants violated their own policies and thereby breached the contract between the Board and the plaintiff, this part of the decision of the Court of Civil Appeals remains in full force and effect, without our reviewing it or expressing any opinion on it.

Appendix C

REVERSED AND REMANDED.

WOODALL, J., and BEATTY, Special Justice,* concur.

SEE, LYONS, and HARWOOD, JJ., concur specially.

HOUSTON, BROWN, and STUART, JJ., dissent.

SEE, Justice (concurring specially).

I concur with the main opinion's holding reversing the judgment of the Court of Civil Appeals. I also concur with Justice Harwood's special writing. I write specially, however, to note additional implications of this Court's reliance on *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).

In the case before us, the issue is whether McCord-Baugh's constitutional right, under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, has been abridged by the decision of the Birmingham City Board of Education not to increase her pay, a decision McCord-Baugh argues is an " 'irrational and wholly arbitrary' refusal to pay [McCord-Baugh] the same as similarly situated Community School Coordinators." There is no suggestion that McCord-Baugh is a member of any class that would require a close-scrutiny analysis of her case.

I have no objection, if I may be permitted any, to the Supreme Court's interpreting the Equal Protection

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* Retired Associate Justice Sam A. Beatty was appointed on March 3, 2004, to be a Special Justice in regard to this appeal.

Clause of the Fourteenth Amendment as applicable to individuals; that interpretation is consistent with the plain language of the amendment. ("No State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." (Emphasis added.)) Indeed, it is a peculiar artifact of the time in which we live that the Supreme Court would have to address whether a constitutional provision that says it applies to "any person" applies not just to a large class of persons, but also to a "class of one," that is, a class composed of one such "person."

I also note that McCord-Baugh presumably still must satisfy the rational-basis standard applied to equal-protection cases:

> "In equal protection jurisprudence, any law that does not employ a classification based on race, sex, national origin, or legitimacy of birth and does not impinge upon a fundamental right, is subject to the 'rational relationship' analysis. Under this analysis, any law rationally related to a legitimate governmental objective will withstand an equal protection challenge. See generally *Lyng v. Castillo*, 477 U.S. 635, 106 S.Ct. 2727, 91 L.Ed.2d 527 (1986); *County Board v. Richards*, 434 U.S. 5, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977)."

Ex parte Robertson, 621 So.2d 1289, 1291 (Ala.1993). However, the case before us is quite different from the cases to which the rational-relationship analysis is

ordinarily applied. In the case before us, what is at issue is McCord-Baugh's job title and pay. The rational basis for the Legislature's adopting a statute is a wholly different question from the rational basis for paying one employee differently from another.

This case involves not the validity of a statute, but the inner workings of an instrumentality of government. It raises separation-of-powers questions among the branches of the state government, and it raises federalism questions when brought in the federal courts—with federal question jurisdiction, it appears, over every salary decision on every state employee. In particular, the review of state administrative decisions may thrust the federal government, in the mantle of its courts, into the review of salary decisions made by state managers for the rationality of a manager's decision on the appropriate pay for an individual employee. This in turn raises the specter of *New York v. United States*, 505 U.S. 144, 175, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) ("federal action would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments").

Such questions, however, while of the greatest moment, are not before us today. And if the Supreme Court of the United States did not mean for the sweep of *Olech* to be as broad as its language, then that is a matter for another day.

Appendix C

LYONS, Justice (concurring specially).

I concur in the main opinion. I join Justice Harwood's special concurrence. There is sufficient conflict among the federal circuit courts of appeal as to the meaning of *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), to invite resolution of this issue by the United States Supreme Court in some future proceeding.

HARWOOD, Justice (concurring specially).

I concur in the main opinion. I write specially to note additional considerations that persuade me its reasoning is sound under the particular procedural and evidentiary posture of this case.

The United States Supreme Court's decision on which the main opinion and my special concurrence pivot, *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), is a short and forthright, but somewhat perplexing, opinion. I am perplexed by the fact that the Supreme Court granted Grace Olech's petition for writ of certiorari "limited to" only one of the questions presented by the petition:

> "Whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the claimant does not allege membership in a class or group, but asserts that vindictiveness motivated the government

> to treat her differently than others similarly situated."

Brief of Petitioners at p. i., *Olech.*

Subsequently, in its February 23, 2000, opinion the Court stated: "We granted certiorari to determine whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the plaintiff did not allege membership in a class or group." 528 U.S. at 564, 120 S.Ct. 1073. The Court appears to have rephrased the question accepted for review so as to eliminate from consideration the element of vindictive motivation.

Olech and her husband, residents of the Village of Willowbrook, had applied to the Village to connect their house to its water system, after their well failed. The Village agreed to connect the Olechs' house to its water system, but required as a condition that the Olechs grant it a 33-foot easement, rather than the 15-foot easement customarily required of all other residents connecting to the water system. The larger easement would permit the Village to widen the road on which the Olechs lived. Although the Village subsequently relented and allowed the water connection upon the grant of only a 15-foot easement, the Olechs were without water for three months. *Olech v. Village of Willowbrook*, 160 F.3d 386, 387 (7th Cir.1998). In Ms. Olech's ensuing lawsuit, she alleged that the Village and two of its officials had been motivated to insist on the larger easement because "the Olechs earlier had sued the Village and obtained

damages, for flood damage caused by the Village's negligent installation and enlargement of culverts located near the Olechs' property." 160 F.3d at 387. Ms. Olech alleged that the flood-damage lawsuit had generated substantial ill will and that she and her husband "had been treated differently, to their detriment, from all other property owners in the Village only because their meritorious suit against the Village had angered Village officials." 160 F.3d at 388. The federal district judge granted the defendants Rule 12(b)(6), Fed.R.Civ.P., motion for dismissal, on the ground that Ms. Olech had not sufficiently alleged the type of malice giving rise to Equal Protection Clause liability under prior caselaw. On appeal, the United States Court of Appeals for the Seventh Circuit characterized the case as falling within the category of "vindictive-action equal protection cases" and reversed, holding that if the Village had refused to perform its obligation to provide water for one resident "for no reason other than a baseless hatred, then it denies that resident the equal protection of the laws. And that is sufficiently alleged." 160 F.3d at 388. The court explained that in that class of equal-protection case, the plaintiff must prove "that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant." 160 F.3d at 388.

Despite this background, the Supreme Court ignored the phrasing of the question it had accepted for certiorari review, and engaged in the following "linking" rationale: Because its cases had previously

recognized that an equal-protection claim might be brought by a "class of one" if the plaintiff alleged that he or she had been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment," 528 U.S. at 564, 120 S.Ct. 1073, a plaintiff whose complaint alleged that the defendant had intentionally demanded a concession significantly different from that required from other similarly situated property owners, and that the demand was "irrational and wholly arbitrary" would sufficiently state a "class of one" equal-protection-violation claim. Thus, Ms. Olech's allegations that the Village had intentionally demanded a 33-foot easement rather than the 15-foot easement it required of all other similarly situated property owners and that the demand was irrational and wholly arbitrary were, " *quite apart from* the Village's subjective motivation," sufficient to state a claim. 528 U.S. at 565, 120 S.Ct. 1073 (emphasis supplied). Therefore, the Supreme Court affirmed the judgment of the Court of Appeals for the Seventh Circuit, which had reversed the district court's Rule 12(b)(6) dismissal, but solely on the basis of its separate analysis. It explained that it did "not reach the alternative theory of 'subjective ill will' relied on by [the Court of Appeals]." 528 U.S. at 565, 120 S.Ct. 1073.

It is significant to me that Justice Breyer squarely put before the majority the option of affirming the judgment of the Seventh Circuit on the basis of Ms. Olech's express averment of subjective ill will, but the majority would have none of it; it opted to put all of its eggs in one basket by declaring that a complaint alleging

only intentional discriminatory treatment that is irrational and wholly arbitrary is sufficient to state a claim for relief under traditional equal-protection analysis.

In *Williams v. Pryor*, 240 F.3d 944 (11th Cir.2001), the United States Court of Appeals for the Eleventh Circuit stated the following, in internally confusing dictum (the claim at issue in that case was exclusively "a fundamental rights facial challenge to [an] Alabama statute," 240 F.3d at 952):

> "The Supreme Court recently reaffirmed the Equal Protection Clause is violated (in cases in which heightened scrutiny does not apply) when the plaintiff—whether a class, group, or simply one individual— *proves 'that* she has been intentionally treated differently than other similarly situated *and there* is no rational basis for the difference in the treatment.' *Village of Willowbrook v. Olech*, 528 U.S. 562[, 120 S.Ct. 1073, 145 L.Ed.2d 1060] ... (2000) (holding that plaintiff stated constitutional Equal Protection Clause cause of action by alleging that village acted irrationally, wholly arbitrarily *and out of malice* toward plaintiff when it demanded a 33-foot easement from plaintiff, contrary to 15-foot easements obtained from others similarly situated)."

240 F.3d at 951 (emphasis supplied).

Appendix C

In *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir.2002), by way of contrast, the court expressed its understanding of the holding of *Olech* to be that the Supreme Court had "made clear" in that case "that a party can bring an equal-protection claim by alleging that it has 'been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.' " 281 F.3d at 439. (The plaintiff in that case lost at summary-judgment stage because it had "not provided evidence that it was irrationally or arbitrarily treated differently from similarly situated parties." 281 F.3d at 440.)

Two other federal circuit courts of appeal have expressed their understanding that the Supreme Court has eliminated subjective motivation as a necessary element in a class-of-one equal-protection-violation claim. *Burns v. State Police Ass'n of Massachusetts*, 230 F.3d 8, 12 n. 4 (1st Cir.2000); *Costello v. Mitchell Public School Dist. 79*, 266 F.3d 916, 920 (8th Cir.2001).

In the final analysis, I cannot agree with the seemingly "head-in-the-sand" approach of the Seventh Circuit, by which it ignores the explicit holdings of the Supreme Court in *Olech*, and elects to accept as controlling the opinion of Justice Breyer concurring in the result. I see no reasonable way of interpreting the opinion of the Supreme Court in *Olech* other than to accept it at face value. Justice Breyer presented his position and rationale to the rest of the Court, and the other Justices were not persuaded; they decided

explicitly and without ambiguity that a plaintiff making a class-of-one equal-protection claim has sufficiently stated a claim for relief under traditional equal-protection analysis when he or she alleges (1) that he or she has been intentionally treated differently from others similarly situated and (2) that the treatment was irrational and wholly arbitrary, "quite apart from [the defendant's] subjective motivation." 528 U.S. at 565, 120 S.Ct. 1073. Although, as explained above, I find the holding procedurally perplexing, I cannot ignore the short and to the point *actual* holding.

In closing, I observe that, in my view, our holding in no way precludes the defendants from subsequently coming forth with *proof* that there was a rational and nonarbitrary basis for their decision. At the stage the case reaches us, however, as the main opinion so ably explains, there is no proof in the record of that justification.

SEE and LYONS, JJ., concur.

HOUSTON, Justice (dissenting).

I dissent.

I adopt the unanimous opinion of the Court of Civil Appeals as my dissent. See *McCord-Baugh v. Birmingham Bd. of Educ.*, 894 So.2d 672 (Ala.Civ.App. 2002). I share the concern of Justice Breyer in his opinion concurring in the result in *Village of Willowbrook v. Olech*, 528 U.S. 562, 565, 120 S.Ct. 1073,

145 L.Ed.2d 1060 (2000), that the Court not "transform many ordinary violations of city or state law into violations of the Constitution. It might be thought that a rule that looks only to an intentional difference in treatment and a lack of a rational basis for that different treatment would work such a transformation." In my opinion, Justice Breyer's concern has come to fruition in the majority opinion in this case.

I do not understand *Williams v. Pryor*, 240 F.3d 944, 951 (11th Cir.2001), the only Eleventh Circuit case cited in the majority opinion, as adopting a "class of one" analysis in equal-protection challenges other than in land-use cases.

APPENDIX D — ORDER OF THE SUPREME COURT OF ALABAMA DATED MAY 19, 2008

IN THE SUPREME COURT OF ALABAMA

May 19, 2008

1061128

Ex parte Birmingham City Board of Education. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Birmingham City Board of Education v. Cathy McCord-Baugh) (Jefferson Circuit Court: CV-99-5870; Civil Appeals : 2050955).

ORDER

IT IS ORDERED that the petition for writ of certiorari to the Court of Civil Appeals is granted solely on the ground of alleged conflict with Branch and Marsh.

* * *

PER CURIAM -See, Lyons, Woodall, Stuart, Smith, Parker, and Murdock, JJ., concur. Cobb, C.J., and Bolin, J., dissent.

APPENDIX E — ORDER OF THE SUPREME COURT OF ALABAMA RELEASED SEPTEMBER 30, 2009

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2009

1061128

Ex parte Birmingham City Board of Education

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(In re: Birmingham City Board of Education

v.

Cathy McCord-Baugh).

(Jefferson Circuit Court, CV-99-5870;
Court of Civil Appeals, 2050955)

PARKER, Justice.

The issued writ is quashed. See *Ex parte State of Alabama Dep't of Revenue*, 993 So.2d 898 (Ala.2008).

WRIT QUASHED.

Cobb, C.J., and Lyons, Woodall, Smith, and Shaw, JJ., concur.

Stuart and Bolin, JJ., Dissent.

Murdock, J., dissents (writing to follow).

APPENDIX F — NOTICE TO THE PARTIES DATED DECEMBER 18, 2008

SUPREME COURT OF ALABAMA
December 18, 2008

1061128

Ex parte Birmingham City Board of Education, PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Birmingham City Board of Education v. Cathy McCord-Baugh) (Jefferson Circuit Court: CV-99-5870; Civil Appeals : 2050955).

NOTICE TO THE PARTIES

The parties are hereby directed to file with the Court, within thirty (30) days from the date of this notice, a brief addressing the applicability and effect of the decision in *Engquist v. Oregon Department of Agriculture*, __ U.S. __, 128 S. Ct. 2146 (2008).

The parties' briefs shall be filed simultaneously, and reply briefs will not be accepted.

s/ Robert G. Esdale
Robert G. Esdale, Clerk

APPENDIX G — CERTIFICATE OF JUDGMENT OF THE SUPREME COURT OF ALABAMA DATED SEPTEMBER 30, 2009

IN THE SUPREME COURT OF ALABAMA

September 30, 2009

1061128

Ex parte Birmingham City Board of Education. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Birmingham City Board of Education v. Cathy McCord-Baugh) (Jefferson Circuit Court: CV-99-5870; Civil Appeals : 2050955).

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on September 30, 2009:

Writ Quashed. Parker, J. – Cobb, C.J., and Lyons, Woodall, Smith, and Shaw, JJ., concur. Stuart and Bolin, J.J., dissent. Murdock, J., dissents (writing to follow).

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

Appendix G

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 30th day of September, 2009.

s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

Supreme Court, U.S.
FILED
JAN - 6 2010
OFFICE OF THE CLERK

No. 09-657

IN THE

Supreme Court of the United States

BIRMINGHAM BOARD OF EDUCATION,
Petitioner,

v.

CATHY MCCORD-BAUGH,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is review by this Court jurisdictionally unavailable or inappropriate, given Petitioner's failure to raise the current issue on its appeal in the manner required by settled state procedural rules, and also by Petitioner's failure to raise that issue at trial?

2. If review on the merits is available, is the particular Equal Protection claim in this case barred by *Engquist v. Oregon Dep't of Agriculture*, ___ U.S. ___, 128 S.Ct. 2146 (2008)?

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IN THE

Supreme Court of the United States

No. 09-657

BIRMINGHAM BOARD OF EDUCATION,
Petitioner,

v.

CATHY MCCORD-BAUGH,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF IN OPPOSITION

Respondent, Cathy McCord-Baugh, respectfully submits this brief in opposition.

Petitioner, Birmingham Board of Education, contends that the Alabama Supreme Court inexplicably rendered a decision on federal law that is directly contrary to *Engquist v. Oregon Dep't of Agriculture*, ___ U.S. ___, 128 S.Ct. 2146 (2008).

The reality is quite different: the Alabama Supreme Court could not and did not decide the *Engquist* issue that the Board presents in its Petition to this Court, because the Board failed to present that issue to the Alabama Supreme Court in the manner required by settled Alabama law. And the merits question, if it could be reached, would be

substantially harder than the Board suggests. This Court may not even have jurisdiction; in any event, the Court should deny the Petition.

STATEMENT

This case was filed ten years ago, by Cathy McCord-Baugh, an administrative employee of the Birmingham Board of Education. The case concerns her salary. Under Alabama law, school system salaries are not a matter of individualized managerial discretion, or of individual contracting. Instead, each system is required by law to follow a duly-adopted "salary schedule." *See, e.g.*, Ala. Code § 16-22-10(f) ("Each city and county board of education shall establish and maintain a written salary schedule for each class and type of employee.") McCord-Baugh claimed that, although she performed the job of community school coordinator and was recognized as such by the Board and its agents, she did not receive the salary set forth in the salary schedule for that position. She brought claims under state law, and under 42 U.S.C. § 1983 to enforce the Equal Protection clause of the Fourteenth Amendment.

The trial court granted summary judgment against McCord-Baugh. The Alabama Supreme Court reversed the summary judgment on the Equal Protection claim, and remanded the case for further proceedings. *Ex parte McCord-Baugh*, 894 So.2d 679 (Ala. 2004). The Alabama Supreme Court relied on *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). In *Olech*, this Court had reaffirmed the viability of "class of one" Equal Protection claims: claims based not on an allegation of class-based discrimination but on the assertion that the government had intentionally treated the plaintiff worse than it had treated

other similarly-situated persons, without a rational basis.

The case returned to the trial court, and went to trial. At trial, the Board did not argue that there could be no *Olech*-type "class of one" claim in the employment context. The Board could have made that argument on motion for judgment as a matter of law—even if the Board might have had to frame it as a contention that the Alabama Supreme Court should overrule its 2004 decision—but the Board chose not to do so. Instead, the Board's strategy was to accept the *Olech* "class of one" Equal Protection formulation as the governing law, and to argue that McCord-Baugh had failed to prove the elements required by *Olech*. The trial court denied the Board's motion, the jury found in favor of McCord-Baugh, and the trial court entered judgment on that verdict.

The Board appealed to the Alabama Court of Civil Appeals. Again the Board did not argue that there could be no "class of one" Equal Protection claim in the employment context. Instead, insofar as the Board challenged the merits of the "class of one" theory, it was again only a challenge to the sufficiency of the evidence under the *Olech* formulation. Brief of Appellant, in *Birmingham Board of Education v. Cathy McCord-Baugh*, No. 2050955 (Ala. Civ. App.), pp. 13-23. The Board also made a separate argument about the limits of *respondeat superior* liability, citing *Marsh v. Birmingham Board of Education*, 349 So.2d 34 (Ala. 1977) and *Branch v. Greene County Board of Education*, 533 So.2d 248 (Ala. Civ. App. 1988). Brief of Appellant in No. 2050955, pp. 24-28. Finally, the Board made a statute of limitations argument. *Id.*, p. 28.

The Court of Civil Appeals affirmed the judgment on the jury verdict, without opinion. [Pet. App. 1a].

The Board petitioned the Alabama Supreme Court for certiorari. Alabama Rule of Appellate Procedure 39(a)(1)(E) provides that one of the grounds on which certiorari can be sought is a request for the overruling of Alabama Supreme Court precedent. The Board chose not to include, in its petition to the Alabama Supreme Court, a request for the overruling of the 2004 decision in *Ex parte McCord-Baugh*. Instead, the Board raised two issues. First was the *respondeat superior*, or *March/Branch* issue, under the heading "The Unauthorized Actions of Employees of a Public School Board Cannot Bind the Board." Petition for Certiorari, in *Ex Parte Birmingham Board of Education*, No. 1061128 (Ala. S.Ct.), pp. 3-10. Second was the statute of limitations issue. *Id.*, pp. 10-12. The certiorari petition did not include any issue about the merits of the "class of one" theory—neither a contention that there could be no such claim in the employment context, nor even that McCord-Baugh had failed to prove the elements of such a claim under the *Olech* formulation. The Alabama Supreme Court granted the writ only as to the first issue, regarding *Marsh*, *Branch*, and the limits of entity liability under *respondeat superior*. [Pet. App. 35a].

Then this Court decided *Engquist*, and the Board tried to expand the issues in the Alabama Supreme Court based on *Engquist*. The Board did so by filing a *sui generis* motion styled "Motion to Vacate the Judgment of the Alabama Court of Civil Appeals and of the Trial Court and to Dismiss the Complaint." The Supreme Court of Alabama ordered the parties to file supplemental briefs "addressing the applicability and effect" of *Engquist*. [Pet. App. 37a].

In her supplemental brief, McCord-Baugh pointed out that the *Engquist* issue, or in other words the contention that there could be no "class of one" Equal Protection claim at all in the public employment context, was not properly before the Court, because the Board had not preserved that issue in the procedurally-required way. McCord-Baugh pointed out that the Board had not raised the issue at trial or in its post-trial briefing to the Court of Civil Appeals. McCord-Baugh also pointed out that the Board had not included the issue in its certiorari petition. McCord-Baugh cited caselaw, such as *Ex parte State Department of Revenue*, 993 So.2d 898 (Ala. 2008), holding that in certiorari review of a decision of an intermediate appellate court, the Alabama Supreme Court cannot entertain an issue that is not included in the certiorari petition. McCord-Baugh also pointed out that, on the merits, *Engquist* was distinguishable and should not be read so broadly as to extinguish her claim.

The Alabama Supreme Court agreed with McCord-Baugh that it was procedurally barred from reaching the issue of the viability of the Equal Protection claim on the merits, by virtue of the Board's having failed to include such an issue in its certiorari petition. This is clear from the fact that the Alabama Supreme Court cited one case in its no-opinion summary order quashing the writ of certiorari: *Ex parte State Department of Revenue*, 993 So.2d 898 (Ala. 2008), one of the very cases McCord-Baugh had cited as reflecting the settled law about such a procedural bar. [Pet. App. 36a]. The Board is silent about that crucial fact in its Petition to this Court.

It is, now, dispositively settled that the Board intentionally paid McCord-Baugh less than others

similarly situated, and that the Board had no rational basis for doing so. That is settled by the jury verdict and the affirmance thereof by the state courts, and the Board properly does not ask this Court to decide whether the jury was right about those facts.

ARGUMENT

1. The Court may not have jurisdiction, and certainly should deny the Petition, because the Alabama Supreme Court did not decide the *Engquist* issue that the Board now presents.

This is not a case of state court intransigence in the face of *Engquist*, as the Board contends. The Alabama Supreme Court did not "decide" any federal issue, as the Board claims, in the decision from which certiorari is now sought. *See* Petition at i, 7 (asserting that the Alabama Supreme Court "decided" the issue presented in the Petition). The Alabama Supreme Court did not reach any such issue because of a state-law procedural bar, attributable to the Board's own choice of litigation strategy. So this Court's jurisdiction is questionable at best. If there is jurisdiction, still the Court should not grant review because of this procedural posture.

The Board contends that an appellate court must apply the law as it stands when the court decides the case, even if that represents a change from the law as it stood when the case started. But this maxim always has a caveat, implicit at least: an appellate court does not have to decide an issue that was not preserved and presented to it in the proper procedural fashion. *See, e.g., Yakus v. United States*, 321

U.S. 414, 444-45 (1944).[1] This principle is reflected in this Court's Rule 14.1(g)(i), which requires special focus on ensuring that the issue at hand was properly presented and preserved below, in any case arising to this Court from state courts.

Here, the Alabama Supreme Court recognized that there was a firm and settled state-law procedural bar, by virtue of the Board's own choice of appellate strategy, that kept that Court from addressing the federal issue that the Board raises here. The Board had not raised the issue in its state law petition for certiorari. The Alabama Supreme Court therefore could not reach the issue, under authorities such as *Ex parte State Department of Revenue*, 993 So.2d 898 (Ala. 2008).

Moreover, the Board had not raised the issue in its appeal to the intermediate appellate court, the Court of Civil Appeals. And the Board had not raised the issue by motion for judgment as a matter of law in the trial court. *Engquist* had not yet been decided when the case was in those courts, it is true. But still the Board could have contended that it was entitled to judgment as a matter of law because there could be no "class of one" claim in the employment context. The Board chose not to make that argument, at trial

---

[1] "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. . . . Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. . . . While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts . . ."

and on its appeal from the trial judgment. These litigation choices, too, would have been procedurally fatal to the Board under state law, even leaving aside the *State Department of Revenue* issue.

The failure to raise a federal issue in state court, "at the time and in the manner required by the state law," *Webb v. Webb*, 451 U.S. 493, 501 (1981), leaves this Court without jurisdiction; or if it is not truly a matter of jurisdiction it is nonetheless a reason for this Court to deny review based on principles of comity and judicial economy. *Webb*.

The Board might try to salvage its Petition by recasting it as a request for review of the decision that the Alabama Supreme Court rendered on the Equal Protection issue several years ago at the summary judgment stage. Any such effort would not be enough to solve the procedural—perhaps even jurisdictional—problems that stand in the way of review here.

Under Alabama law, a party that has lost at trial and wants to obtain a reversal of the trial judgment—based on a legal principle or a sufficiency-of-the-evidence argument—must preserve the point through a motion for judgment as a matter of law. In other words, after a trial, Alabama's appellate courts will not consider whether summary judgment was wrongly denied. *See, e.g., Werner Beiersdoerfer v. Hilb, Rogal and Hamilton Co.*, 953 So.2d 1196, 1205 (Ala. 2006). Thus an Alabama litigant who wants to continue to preserve a federal issue so as to overturn a trial judgment, after having failed to win on that basis on summary judgment, must continue to assert its position on the issue at trial and on subsequent appeal.

And indeed Alabama law explicitly provides that a decision rendered in a first appeal can be reconsidered in a later appeal in the same case. Ala. Code § 12-2-13. The Alabama Supreme Court has, when appropriate, reversed itself on a legal question in a subsequent appeal, where intervening legal changes show that the prior decision in the same case was wrong as a matter of law. *See, e.g., Ex parte Discount Foods, Inc.*, 789 So.2d 842, 846 & n.4 (Ala. 2001). So the Board had no excuse for failing to do what it could have done, to preserve this current issue for subsequent review at trial and on its appeal from the trial judgment.

Whether or not this aspect of Alabama procedure is strong enough to deprive this Court of jurisdiction, it is at least a consideration that should lead the Court to decline review as a matter of policy or discretion. This Court should not reverse a state court judgment based on a federal issue that the petitioner failed to raise in the proper way and at the proper time under state law.

2. The *Engquist*-related issue on the merits is more complex than the Board claims, and this Court should not be the first court in the nation to tackle it.

If this Court reached the merits, the case would involve a hard question about the meaning of *Engquist*, a question that (to our knowledge, and so far as the Petition shows) no court has addressed in any case like this one. Did *Engquist* truly abolish *all* "class of one" claims of every conceivable sort in the employment sphere? Or is it possible that some particular sorts of claims may survive, including the claim here? The question is not so extraordinarily

important that this Court should be the first to reach it.

We recognize that there are parts of *Enqguist* that seem to bar all "class of one" claims in employment. The first paragraph of this Court's opinion states, "We hold that such a 'class-of-one' theory of equal protection has no place in the public employment context." *Engquist*, 128 S.Ct. at 2148-49. The Court also made such seemingly categorical statements elsewhere. *Id.* at 2151, 2156.

But arguably the true meaning of *Engquist* is somewhat narrower, and the case bars "class of one" attacks only on those types of employment-related decisionmaking that are inherently case-by-case matters involving subjectivity, discretion and judgment. That narrower reading of *Engquist* is supported by this Court's reasoning. The Court reasoned that an *Olech*-type "class of one" claim is not suited to forms of governmental action "which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." 128 S.Ct. at 2154. The Court returned repeatedly and at length, *id.* at 2154-56, to this line of reasoning. This supports our view that, though some parts of the opinion speak broadly, *Enqguist* should best be read as barring "class of one" claims only for certain types of employment decisionmaking, those in which subjectivity and individualized judgment are inherent.

On that view of *Engquist*, McCord-Baugh's claim would survive, since the salaries of school system employees in Alabama are not a matter of subjective case-by-case discretionary decisionmaking. Instead, salaries are required by state law to be a uniform matter under a set "salary schedule" for each school system. *See, e.g.*, Ala. Code § 16-22-10(f). Therefore,

the reasoning of *Engquist* does not require an exclusion of this case from the general theory of Equal Protection that was reaffirmed in *Olech*. In this case, unlike the types of inherently individualized decisionmaking that were at the heart of *Engquist*, there is no reason to countenance intentional and arbitrary governmental departures from the constitutional norm of equal treatment. Here, in contrast to *Engquist*, there is a generally applicable baseline against which McCord-Baugh's treatment can be measured: it is the salary schedule. This case is, therefore, like those types of cases that *Engquist* recognized as being well-suited for the "class of one" Equal Protection theory. 128 S.Ct. at 2154-55. This case involves treatment that was supposed to be uniform, but government officials made an intentional and arbitrary departure from that norm of uniformity.

This question about how broadly to read *Engquist* is a real question, of at least some reasonable difficulty. But it is not a question that this Court should reach at this time. The Alabama courts did not decide it. The Board cites no decision from any other court in the nation that has decided it. It is not a particularly burning or vitally important question. This Court should not become the first court in the nation to wrestle with this rather esoteric question.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 09-657

IN THE

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BIRMINGHAM BOARD OF EDUCATION,

Petitioner,

v.

CATHY McCORD-BAUGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

REPLY BRIEF

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ARGUMENT

Respondent Cathy McCord Baugh's ("Baugh/Respondent") brief in opposition confirms the need for review by this Court. First, Respondent argues that the Birmingham Board of Education ("Board") failed to properly preserve the issue that is raised in its petition for certiorari. Secondly, Respondent argues that even if the issue had been properly preserved, the issue is too complex and thus, this Court should not tackle it. Respondent's argument that no court has addressed what she considers to be a "complex" issue, is the very reason that the United States Supreme Court should grant the Board's petition for certiorari and resolve the issue now.

I. RESPONDENT'S BRIEF CONFIRMS THAT THIS COURT SHOULD ADDRESS THE APPLICABILITY AND EFFECT OF *ENGQUIST* IN THE INSTANT CASE

The Board is clear that the instant case is analogous to *Engquist v. Oregon Department of Agriculture*, 128 S.Ct. 2146 (2008); and thus, Baugh's equal protection class-of-one claim cannot stand against a public entity such as the Board. However, Baugh herself seems to find the holding in *Engquist* to be ambiguous or more complex than that. Baugh argues that *Engquist* may not abolish all equal protection class-of-one claims against public entities. Brief in Opposition at pgs. 9-10. Baugh further questions whether some equal protection class-of-one claims, such as those brought in the instant case, may be an exception to the holding in *Engquist*. Brief in Opposition at pgs. 9-10.

The Board's position is clear. Baugh, just as the plaintiff in *Engquist*, brought an equal protection class-of-one claim against a public entity. *Engquist* holds that "the class-of-one theory of equal protection has no application in the

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public employment context." *Engquist* at 2156. However, Baugh argues that *Engquist* should be read as barring "class of one" claims only for certain types of employment decision-making, those in which subjectivity and individualized judgment are inherent. Brief in Opposition at page 10.

Clearly, if this Court intended to differentiate or to make exceptions to its holding in *Engquist*, it would have done so in that decision. Moreover, the Board finds no distinction between the decision-making process in the instant case and such process in *Engquist*. Nevertheless, Baugh's argument that such an analysis is necessary to determine the issue at hand, is one reason that this Court should grant the Board's petition.

II. THE ISSUE RAISED IN THIS APPEAL WAS PRESERVED AND CONSIDERED BY THE ALABAMA SUPREME COURT

Baugh argues that the Alabama Supreme Court did not decide the *Engquist* issue, which is the subject of this petition. However, after granting the Board's petition for writ of certiorari, on December 18, 2008, the Alabama Supreme Court issued an Order specifically directing the parties to simultaneously file briefs "addressing the applicability and effect of the decision in *Engquist v. Oregon Department of Agriculture*." See petition at App. 37a. In accordance with that Order, both parties submitted briefs regarding the applicability of *Engquist* on January 20, 2009. Thereafter, on September 30, 2009, the Alabama Supreme Court issued a decision quashing the writ previously granted, and in essence upholding the judgment against the Board on Baugh's equal protection "class-of-one" claim. See petition at App. 36a.

Moreover, Baugh's contention that the Board did not properly preserve the issue that it now raises in its petition is flawed. Baugh mistakenly argues that the Board is barred from relying on the United States Supreme Court decision in *Engquist*, holding that the " 'class-of–one' theory of equal protection has no place in the public employment context." In support of this contention, Baugh maintains that the Board failed to argue that there could be no "class of one" claim in the employment context in the trial court and in the intermediate appellate court. See Brief in Opposition at pg. 7.

However, the only claim that remained alive throughout this case is Baugh's Section 1983 equal protection "class-of-one" claim. This is the only claim that was at issue during the trial.[1] After the trial court entered a verdict/judgment in favor of Baugh, the Board filed an appeal with the Alabama Court of Civil Appeals. The only claim that still remained at that time was Baugh's Section 1983 equal protection "class-of-one" claim. Accordingly, after the Alabama Court of Civil Appeals affirmed the trial court's verdict/judgment, the Board petitioned the Alabama Supreme Court for a writ of certiorari based on that one remaining claim.

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[1] Baugh's case was originally brought pursuant to two claims, i.e., a breach of contract claim and a Section 1983 equal protection "class-of-one" claim. Both claims were initially disposed of at summary judgment. Baugh then appealed to the Alabama Court of Civil Appeals, which affirmed the trial court's grant of summary judgment. Thereafter, Baugh appealed to the Alabama Supreme Court, who affirmed the lower courts' holdings regarding Baugh's breach of contract claim, but held that Baugh could bring an equal protection "class-of-one" claim against the Board. Accordingly, after the individual defendants were dismissed under the doctrine of qualified immunity, Baugh's equal protection "class-of-one" claim was tried before a jury.

Therefore, the only claim that is currently pending against the Board is Baugh's Section 1983 equal protection "class-of-one" claim, which is the exact claim that this Court held cannot be brought against a public entity such as the Birmingham Board of Education, in *Engquist.*

Baugh argues that the Board could have or should have argued that Baugh could not bring an equal protection class-of-one claim in the lower courts. However, there was clearly no reason for the Board to make such an argument at that juncture, when this Court's ruling in *Village of Willowbrook v. Olceh*, 528 U.S. 562 (2000) held that such claims could be brought. Any such argument by the Board in the trial court or in the Alabama Court of Civil Appeals would have been futile. It has long been established that decisions of the United States Supreme Court interpreting federal law are binding upon both federal and state lower courts. See *Henry et al., v. City of Rock Hill*, 376 U.S. 776,777 (1964) (holding that a rule stated in a decision by the Supreme Court of the United States and based upon the Federal Constitution is, under the supremacy clause, binding upon state courts as well as upon federal courts); *A.L. Lockhart v. Fretwell*, 506 U.S. 364,376 (1993) (THOMAS, concurring) (acknowledging that a state court is bound by the U.S. Supreme Court's interpretation of federal law, but is not bound by the interpretation of a federal court of appeals). Thus, the Board had no viable reason to make such an argument prior to this Court's decision in *Engquist* which distinguished *Olech* and held that "the class-of-one theory of equal protection has no application in the public employment context."[2] *Engquist* at 2156.

[2] While it is true that in 2007, the Ninth Circuit Court of Appeals reversed the jury verdict in *Engquist v. Or. Dept. of* (Cont'd)

CONCLUSION

It is the Board's position that the law is clear as it relates to the issue presented in the instant case. Baugh, just as the plaintiff in *Engquist*, brought an equal protection class-of-one claim against a public entity. *Engquist* holds that "the class-of-one theory of equal protection has no application in the public employment context." *Engquist* at 2156. Thus, this Court should grant the petition for certiorari and summarily reverse the holding of the Alabama Supreme Court. However, if this Court is inclined to consider respondent Baugh's unique and novel argument regarding a possible interpretation of the *Engquist* decision, the instant case is the perfect opportunity for this Court to do so. Accordingly, the petition for a writ of certiorari should be granted.

(Cont'd)
Agriculture, 478 F.3d 985 (9th Cir. Or. 2007), and held that "[t]he class-of-one theory of equal protection does not apply in the public employment context, no such precedent existed in Alabama nor in the Eleventh Circuit at that time. Thus, the Board had no reason to rely on that decision. See *United States v. Major*, 303 Fed. Appx. 798, 802 (11th Cir. 2008), (stating that opinions from other circuits do not constitute binding precedent); *Fanin v. VA*, 572 F.3d 868, 874 (11th Cir. 2009), (stating that "any number of assaults from other circuits cannot overrun one binding precedent from our own circuit"); Passmore *Swann v. Health Partners Inc.*, 388 F.3d 834,837, (finding that "[i]n this circuit, only the court of appeals sitting en banc, an overriding United States Supreme Court decision, or a change in the statutory law can overrule a previous panel decision.").

In fact, from the beginning of this case the Board argued that Baugh could not bring an equal protection class of one claim in this matter. However, the Alabama Supreme Court, following *Olech*, held that such a claim could be brought by Baugh. Clearly, the decision of the Alabama Supreme Court relying on *Olech*, which was the law of the land at that time, was the binding precedent on this issue.

Respectfully submitted,

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